SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1969

No. .....

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

against

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

Defendants, the Commissioner and the Department of Social Services of the State of New York, appeal from orders of a three-judge Court (28 U.S.C. § 2281) of the United States District Court, Southern District of New York (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, D.J.), entered September 12 and October 22, 1969, preliminarily enjoining them from enforcing New York Social Services Law § 131-a insofar as that statute provides for differential monthly welfare allowances as between welfare recipients within the City of New York and those in the remainder of the State. The first order (26a-27a)* applied

* Numbers in parentheses refer to pages in the Appendix to this Statement.

only to recipients of aid to the aged, blind and disabled. The second (28a-29a) permitted intervention by recipients of aid to families with dependent children (herein "AFDC") and applied the preliminary injunction to them as well.

By stipulation dated October 24, 1969 all parties have consented to the consolidation of these appeals.

Opinions Below

The opinion of the District Court (MOTLEY, J.) granting the plaintiffs' motion to convene a three-judge Court, and the opinion of the three-judge District Court granting the preliminary injunction, are not yet reported. Both are set forth herein at pages 1a-25a. No opinion was entered in support of the order granting intervention to plaintiffs Jones and Harvanek.

Jurisdiction

The order granting the preliminary injunction was entered September 12, 1969 and defendants' notice of appeal was served and filed October 10, 1969. The order granting the application of plaintiffs Jones and Harvanek for leave to intervene on behalf of their class of AFDC recipients and extending the preliminary injunction to their class, was entered October 22, 1969 and defendants' notice of appeal therefrom was served and filed October 24, 1969. Jurisdiction to review these orders is conferred by 28 U.S.C. § 1253.

Statute Involved

New York Social Services Law § 131-a in pertinent part provides:

> "1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials

shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in acordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

Questions Presented

1. Is New York Social Services Law § 131-a, providing monthly allowances for welfare recipients (exclusive of rent and fuel for heating) at schedules slightly higher for recipients residing in the City of New York, violative of the equal protection clause?

2. Is the issue of the validity of § 131-a under the equal protection clause ripe for federal judicial determination where an aggrieved welfare recipient has an expeditious remedy available in the State to compel the Commissioner of Social Services to increase the allowances for each county, and where the Department of Health, Education and Welfare has not yet passed administratively on the conformity of the statute to the Social Security Act?

Statement of the Case

Under New York law payment to welfare recipients is disbursed in monthly allowances to provide for mainte-

nance at New York's standard of need for all such recipients. Social Services Law §§ 131, 131-a. These allowances are the same regardless of the category of aid given the recipient. The amounts paid do not reflect rent or fuel for heating, which are separately paid to each recipient. Allowance levels were, prior to July 1, 1969, computed administratively by the Commissioner of Social Services. The State was divided into three zones for welfare-allowance purposes and allowances varied slightly between these zones, as follows (statistics for family of four as of 1968, excluding rent and fuel):

SA-1	SA-2	SA-3
(New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)	(All counties not in SA-1 or SA-3)	(Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)
$152-221	$149-218	$146-215

These $3-per person differences hinged on local variations in the average cost of utilities. The variation within each region depended on the age of the oldest child in each family.

In 1969 the Legislature enacted Social Services Law § 131-a, which established statutory allowances and abolished differentials based on the age of the oldest child. These allowances, which became effective July 1st, provided for $208 per month for a family of four in the City of New York (again exclusive of rent and fuel) and $183 in the remainder of the State.

Since rents, as a result of rent control within the City and greater availability of accommodations, are on the average substantially lower for welfare recipients in the City than for those in suburban areas, the actual amounts received by suburban recipients were frequently as much as, or greater than, those within the City. For example, the average rent for a welfare family of four in New York

City in 1968 was $83.90. In Nassau County the lowest maximum allowable rent for even one person on welfare is $100, and for four persons is $155.*

Such geographical differentials in welfare payments are not unusual. In California, for example, counties are authorized to pay amounts over the state allowance, and these amounts vary from $5.35 per person per month in San Francisco County to $.13 in Fresno County. Los Angeles County pays $2.40 per month, while neighboring Orange County pays $1.02. Calif. Welfare & Insts. Code §§ 11450-52; see "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs," 15 UCLA Law Rev. 787, 812-815 (1968).

The chief reason for the differential between allowances (exclusive of rent) to New York City recipients and those outside the City was the legislative finding of a higher social cost of living in the metropolitan center, resulting from the higher level of aspiration and heightened expectations within the City of New York, and most significantly the availability of, and need for, more recreational facilities (parks, zoos, beaches, and the like) especially for children, than in a non-city environment in which children are far more apt to have an available vacant lot or field in which to play. (See Affidavit of V. Murphy [Doc. 12], pp. 3-5):

> "The Department's experience has shown that New York City welfare recipients' actual expenses substantially exceed those of recipients in the remainder of the State. This is due to their higher level of aspiration, greater expectations, the effects of living in a great metropolitan center, and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more

* The proof here showed that plaintiff Rothstein receives $103.25 for rent and plaintiff Batson $106.52 (Murphy Aff. pp. 11-12).

space in which to play. New York City life, realistically, in the experience of the Department, includes transportation to beaches, museums, and parks. It includes a higher crime rate which requires safety locks, greater loss of money and material from burglaries, as well as higher laundry and housecleaning expenses due to soot, air pollution and the like.

In fact, the monthly average payments per recipient vary substantially as between New York City and the suburban counties. The average payment on the Aid to Families with Dependent Children (AFDC) program—by far the largest component of welfare in this State—is $72.28 in New York City and $69.32 in the suburban counties. The variation under the Medical Assistance program is sharper—$123.57 in New York City, $91.55 in the suburban counties. The figures for the remainder of the State are substantially lower than those in the suburban counties. It is to be noted that the levels of welfare in New York State, both prior to the adoption of § 131-a and in that statute, are identical for all programs of welfare—AFDC, Aid to the Blind, Aid to the Disabled and the like.

Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients in New York City—889,000 out of 1,211,000 in the State (1968 monthly average). The City warrants special consideration and the Legislature was simply recognizing that fact. In New York City per capita welfare expenditures per total population amounted in 1968 to $66.12; the statewide average is $39.12 and Nassau County only $13.83. Not one of the fifty-seven counties outside New York City was above the statewide average figure."

On May 2, 1969 the Legislature amended § 131-a(4) so as to authorize appellant Commissioner of Social Services to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but

not to exceed the level provided for recipients in the City of New York, "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." The amendment expressly authorizes a county social services official to apply for such increase in allowances.

Soon thereafter, on June 5, 1969, the Commissioner, acting pursuant to the amended § 131-a(4), promulgated a regulation (18 NYCRR § 352.4) which revised the schedule of allowances for the counties outside the City of New York which had formerly been within the SA-1 zone,* and increased the monthly allowance from $60 to $65 for an individual recipient and from $183 to $191 for a family of four. (The comparable figures within the City of New York are $70 to $208.)** This administrative action sharply reduced the existing differential between the allowances paid within and outside the City of New York.

Prior to the commencement of this action, the claim here asserted was alleged in *Rosado* v. *Wyman* (presently before this Court, No. 540, argued Nov. 19, 1969), and was the issue which required the convening of a three-judge Court. After hearing argument, that Court dissolved itself by order dated May 12, 1969 on the ground that the amendment to § 131-a(4) mooted the issue (——F. Supp. —— [E.D.N.Y. 1969]):

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* Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties. These counties are presently designated "SA-2" (18 NYCRR § 352.4).

** The following table shows the monthly allowances for the various parts of the State of New York before and after the advent of § 131-a.

Before July 1, 1969:

SA-1 (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$66	$94-110	$125-156	$152-198	$180-238	$204-274	$234-354	$262-395	$293-437	$320-464

SA-2 (All counties not in SA-1 or SA-3)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$63	$91-107	$122-153	$149-194	$176-234	$200-270	$230-350	$259-391	$289-433	$317-460

SA-3 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$60	$88-105	$119-150	$146-192	$173-231	$197-267	$226-346	$255-387	$284-429	$312-456

July 1, 1969 and after:

SA-1 (New York City)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$70	$116	$162	$208	$254	$297	$340	plus $43 for each additional person

SA-2 (Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$65	$107	$149	$191	$233	$270	$307	plus $37 for each additional person

SA-3 (All counties not in SA-, 2 or 4)

1	*2*	*3*	*4*	*5*	*6*	*7*	
$62	$104	$146	$188	$230	$267	$304	plus $37 for each additional person

SA-4 (Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming Counties)

1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
$59	$101	$143	$185	$227	$264	$301	plus $37 for each additional person		

By bulletin dated Sept. 25, 1969, allowances of AABD recipients, state-wide, were increased $8 per month for persons living alone and $5 for persons living with families, pursuant to a demonstration project.

"Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may —either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding."

The dissolution of the three-judge Court in *Rosado* was affirmed by the Court of Appeals, Second Circuit, on July 16, 1969, —— F. 2d ——. The majority opinion by Judge HAYS held that any determination by the three-judge court "would have been premature" and that "[t]he Court was right in refusing to act on facts that were fluid and subject to early change." It noted that it was "confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development."

While *Rosado* was on appeal to the Court of Appeals, this action was brought in the District Court, Southern District of New York, for judgment declaring that § 131-a was unconstitutional as a denial of equal protection as a result of the differential in allowances, and violative of 42

U.S.C. § 302(a)(1), which requires a State plan to "be in effect in all political subdivisions of the state," and of the regulation of the United States Department of Health, Education and Welfare (herein "HEW") (45 CFR § 233.20[a]) which provides that state welfare programs "[s]pecify a Statewide standard" and "[p]rovide that the standard will be uniformly applied throughout the State" (Complt. pp. 10, 11). The plaintiffs, recipients of aid to the aged, blind and disabled, also sought an injunction against enforcement of the statute, only "on the ground that said grants and schedules are in violation of and inconsonant with the requirements of the federal Social Security Act and regulations * * *" (Complt. p. 13). The complaint sought no permanent injunction on the constitutional claim.

Nonetheless, the plaintiffs moved before MOTLEY, J. for a three-judge court and a preliminary injunction on both the constitutional and statutory grounds. Appellants opposed both, on the merits and on the ground that the dissolution of the three-judge court in *Rosado* was dispositive here. Appellants were afforded no opportunity to offer evidentiary material or even a brief on the propriety of the application to convene the three-judge court.

On July 7, 1969 the District Court (MOTLEY, J.) granted the plaintiffs' application to convene the three-judge court (24a) and argument was had before that Court (HAYS, C.J., MANSFIELD, D.J. and MOTLEY, J.) almost immediately thereafter.

That Court issued a preliminary injunction against implementation of § 131-a "other than according to objective, non-discriminatory standards based upon the cost of the needs of [welfare] recipients" (26a). The decision underlying the injunction relied heavily on the oral deposition of appellant Commissioner Wyman in which he "stated that he did not know why the Legislature differentiated between New York City and surrounding counties and that it was not done on his recommendation" (6a). This statement in

fact sheds no light whatever on the basis for the action of the Legislature and utterly fails to rebut the powerful presumption that the Legislature had a rational basis for the statute. Section 131-a was not proposed or drafted by appellants and the statement of Commissioner Wyman simply provides no evidence at all of legislative intent.

The Court discarded the powerful showing of legislative purpose shown in the affidavit of appellants, and, although formally acknowledging that "wisdom dictates that in the interest of maintaining a proper balance between state and federal authorities the Equal Protection Clause should not be used to interfere with the state legislative process" (10a), nevertheless carved out a totally unprecedented exception to this rule in the case of welfare legislation. It went on to conclude that § 131-a was violative of the equal protection clause "even when judged by the traditional, rather than the more stringent standard" (13a), preliminarily enjoining appellants, as Commissioner and Department of Social Services, from enforcing the statute "other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients" (20a). It denied appellants' motion for summary judgment and directed a trial (*id.*), which was adjourned pending disposition of this appeal (Doc. 18).

Thereafter plaintiffs Jones and Harvanek applied, by order to show cause dated October 6, 1969, to intervene on behalf of AFDC recipients outside the City of New York (Doc. 19). The Court granted such intervention and, by order dated October 22, 1969, extended the preliminary injunction to them (Doc. 26). An application by appellants to stay the enforcement of these injunctions, which will, unless stayed, result in enormous expenditures by the federal, state and county governments, was denied by the Court on October 27, 1969. Since the moneys required to be spent in pursuance of these injunctions are effectively irretrievable once disbursed, appellants have applied to this Court for a stay pending disposition of this appeal.

ARGUMENT

This appeal raises substantial issues requiring disposition by this Court.

1. The slight differential in allowance provided for welfare recipients residing in the City of New York is based on the higher social cost of living in a large metropolitan center where recreational facilities are typically distant and needs for laundry, locks and other components greater. This provision has a rational basis and does not deprive plaintiffs of equal protection of the laws.

The Court below improperly reversed the presumption of validity of the State statute—a presumption consistently expressed by this Court in the strongest terms (see *Ferguson* v. *Skrupa,* 372 U. S. 726 [1963])—and thrust the burden of proving its validity upon appellants, the State officials charged with its administration. In issuing the sweeping preliminary injunction, the Court completely undermined the holding of this Court in *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802, 809 (1969) that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

Statutory distinctions between the City of New York and the remainder of the State are common to New York law and have been repeatedly upheld as against claimed denials of equal protection in a variety of contexts. See, e.g., *Matter of Hogan* v. *Rosenberg,* 24 N. Y. 2d 207, 216-218 (1969), app. dism. *sub nom. Puryear* v. *New York,* October 13, 1969 (No. 336, Misc.) (upholding statute permitting jury trial for misdemeanor prosecutions except in New York City); *Spatt* v. *City of New York,* 14 A. D. 2d 30 (2d Dept. 1961) (sustaining New York City compen-

sating-use tax, which taxed property purchased by City residents outside New York City at higher rates than property purchased within the City). Long ago this Court recognized the unique status of New York City and the particular validity of laws relating to it alone. See *Missouri* v. *Lewis*, 101 U. S. 20, 31 (1879), cited with approval in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n. 6 (1954):

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law."

The applicable rule in determinating whether State enactments run afoul of the equal protection clause is whether there exists any rational basis for the classification. Only where the grounds employed by the State are "wholly irrelevant to the achievement of the State's objective" may the statute be struck down. *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *McDonald* v. *Board of Election Commissioners, supra.*

Here there was *uncontroverted* proof in the record as to the precise purpose of the differential provided by § 131-a. Appellant Commissioner Wyman expressly testified (Deposition [Doc. 27], p. 36):

> "The essential difference is in the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily

> available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements."

The affidavit submitted by appellants (see pp. 6-7, *supra*) bolstered this showing that a rational basis for the $5 per month differential existed. This evidence was never contradicted by plaintiffs and is the only evidence of legislative intent in this record. It provided more than an ample basis for the statutory distinction here attacked.

The Court below, incredibly, sloughed off this proof as no more than an "assumption" which "we find ourselves unable to accept" (15a). It impermissibly substituted its own opinion for that of the Legislature. See *Ferguson* v. *Skrupa, supra,* 372 U. S. at 728-730; *Snell* v. *Wyman,* 281 F. Supp. 853, 862, 863 (S.D.N.Y. 1968), aff'd 393 U. S. 323:

> "Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.
>
> Against plaintiffs' views, as defendants point out there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * *
>
> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won

> the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *
>
> The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality."

Judge MANSFIELD's opinion, in denigrating and in effect disregarding the *only* evidence of legislative intent in the record, suggested that the aged, blind and disabled were unable, "in view of their physical handicaps, to make any appreciable use of many of the facilities described by the *defendant*" *(15a). This statement, superficially irrefutable, egregiously ignores the fact that in New York the welfare allowances are uniform for all recipients, of whom the overwhelming preponderance are AFDC recipients.* The standards on which the differential was based are plainly applicable to AFDC recipients, who by definition are children and their unemployed parents. The assertion that the State Legislature's reasons for providing a slight additional allowance in the case of children residing in the City of New York must be ignored because the plaintiffs were recipients of adult assistance (15a)—pointless in any

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* New York State has 886,860 recipients of AFDC out of a total of 1,210,601 welfare recipients (1968 figures). In the City of New York there are 657,089 AFDC recipients out of 889,262. As we have noted (fn. p. 9, *supra*), under a recent demonstration project, effective September 25, 1969, AABD recipients are receiving increments of $8 per month, state-wide, if living alone, and $5 if living with a family.

event since the Legislature had the right to base its differential on a reason applicable to the greatest number of recipients (where all classes of welfare recipients receive the same allowance)—was completely dissipated by the intervention of AFDC recipients as parties plaintiff and the extension of the preliminary injunction to their class (28a-29a).

The Court likewise disregarded the fact (Murphy Aff. p. 3) that the New York City Department of Social Services, in applying for permission to establish a 1968 program in which special grants to welfare recipients were replaced by a cyclical grant of $100 per year, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." This application was approved by appellants and by HEW, and was reflected in the differential in § 131-a.

It is ironic that the Court below cast its attack on the statute in terms of objecting to the use of AFDC criteria in providing a differential to all City of New York recipients (of whom AFDC recipients constitute 75%). Not all states pay identical allowances to AFDC and adult recipients. And in states which pay less to AFDC families that disparity has been attacked as a denial of equal protection. See *Jefferson* v. *Hackney*, —— F. Supp. —— (N. D. Tex., July 1969, Civ. 3-3012B); *Lampton* v. *Bonin*, 299 F. Supp. 336 (E. D. La. 1969).

What the Court below demanded of New York was just that "mathematical nicety" which this Court has declared not to be required by the equal protection clause. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911). As the Court held in *Jefferson* v. *Hackney*, "There remain priorities in time and functions in alleviating human misery. Unless the Court mandates that all human needs be met, we must accept classifications and piecemeal solutions which are not egalitarian between all programs and all human beings." See also *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955).

The *Jefferson* decision rejected the very conclusion on which the Court below so heavily relied—that the subject-matter of this statute automatically rendered inapplicable the rule that legislative distinctions be sustained unless patently irrational, and placed the burden on the State to demonstrate some "compelling interests" in the differential. As the Court in *Jefferson* ruled, the considerations which thrust that burden on the states in the cases cited by the plaintiffs there (and by the plaintiffs and the three-judge Court here) are inapplicable to a statute establishing welfare allowance levels. No impairment of the right to travel is involved, as in *Shapiro* v. *Thompson* (394 U. S. 618 [1969]), or on the right to vote, as in *Harper* v. *Virginia Board of Elections* (383 U. S. 663 [1965]). There is no analogous constitutionally protected right to any particular level of welfare benefits, or indeed to welfare at all. Nor could there be, in view of current proposals by numerous enlightened commentators to dismantle the entire welfare structure and replace it with some completely new program, such as guaranteed income. Thus the disposition below, which shifted the burden of showing legislative intent from the attackers to the defenders of the statute, was plainly improper.

In *Jefferson*, the Court went on to hold that statutes providing for welfare allowances "must be determined by traditional equal protection standards," citing *McDonald* v. *Board of Election Commissioners, supra,* in which this Court rejected a parallel argument that the "compelling state interest" standard be applied to a statute denying absentee ballots to persons jailed awaiting trial. In *McDonald,* as here, the distinctions were not "drawn on the basis of wealth or race, * * * two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." 394 U. S. at 807. After holding, as we have seen, that "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent" (*id.* at 809),

this Court ruled (*id.* 809):

> "With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89 (1907)."

Under the applicable test—whether "no grounds can be conceived to justify" the differential (*McDonald, supra* at p. 809), plaintiffs' assertions collapse. No doubt reasonable minds might differ as to the existence, or extent, of the greater social cost of residing in the City of New York.* But once that be conceded—as it must—judicial inquiry is foreclosed. *Ferguson* v. *Skrupa, supra* (372 U. S. at 730):

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative

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* It is noteworthy that the actual average payments per recipient even prior to the enactment of § 131-a were, because of a much greater frequency of special grants, substantially higher within New York City:

Programs	*New York City*	*Suburban Counties*	*Urban Upstate Counties*	*Remainder of State*
AFDC	$72.28	$69.32	$50.51	$39.07
AFDC-Unemployed Fathers	$72.89	$57.68	$42.30	$34.92
Medical Assistance	$123.57	$91.55	$69.65	$57.48
Home Relief	$43.68	$39.53	$27.54	$20.11

bodies, who are elected to pass laws. As this Court stated in an unanimous opinion in 1941,* 'We are not concerned . . . with the wisdom, need or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' "

In fact what the Court below did here was precisely what this Court condemned in *Ferguson* and *McDonald.* It violated the tenet of Mr. Justice HOLMES' dissent in *Tyson & Bro.—United Theatre Ticket Offices,* v. *Banton,* 273 U. S. 418, 445-446 (1927), by failing "to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that the Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

Implicit in plaintiffs' argument is an insistence that the Court required every welfare recipient to receive the same allowance. But this is a grotesquely unreal supposition. The allowances paid to recipients in the same category by the various states fluctuate enormously, far beyond whatever variations in the cost of living may exist. AFDC recipients in New York receive an average of $278 per month for a family of four; in Mississippi, $55. Among Northeastern states, where the cost of living is essentially the same, the average monthly allowance to an AFDC recipient varies from $71.75 in New York to $52.00 in Connecticut, $47.80 in Rhode Island, $38.55 in Pennsyl-

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* *Olsen* v. *Nebraska,* 313 U. S. 236, 246 (1941).

vania and $32.25 in Delaware. If it be argued that each state is sovereign and free to set its own level, it should be noted that the federal government pays approximately half of these amounts.

Moreover, there is no constitutional requirement that identical grants be made to each locality within a given state. See *McInnis* v. *Shapiro*, 293 F. Supp. 327, 336 (N. D. Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322, rejecting a claim of denial of equal protection resulting from variations in aid-per-pupil to school districts ("Nor does the Court establish the rigid guideline of equal dollar expenditures for each student."). Geographical distinctions are not "inherently suspect" as are those, for example, based on race or wealth. And the States' reasonable classifications in this area are not subject to constitutional challenge. *Detroit Edison Co.* v. *East China Tp. School Dist. No. 3*, 247 F. Supp. 296 (E. D. Mich. 1965), aff'd 378 F. 2d 225, cert. den. 389 U. S. 932.

New York legislation has treated the City of New York as *sui generis* in numerous cases. See *Matter of Hogan* v. *Rosenberg, supra; Spatt* v. *City of New York, supra; DiPrima* v. *Wagner*, 14 A. D. 2d 36 (1st Dept. 1961), aff'd 10 N. Y. 2d 728; *Adler* v. *Deegan*, 251 N. Y. 467 (1929). The entire Multiple Dwelling Law of New York is limited in its application to the City of New York. The Court system and large portions of the Code of Criminal Procedure differ markedly as between the City of New York and the remainder of the State. These instances of the pattern of legislative differentiation between the City and the rest of the State are far more pervasive than the one attacked here.

In *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328 (1966), this Court upheld the authority of Congress to deal with the problem of voting discrimination in areas where it was established to be most serious. There, unlike the instant case, the constitutionally-protected right to vote

was involved—yet the classification adopted by Congress was sustained, in the absence of an affirmative showing of irrationality. The plaintiffs have made no such showing here.

Indeed, far from showing the requisite invidious distinction, the plaintiffs failed to show any distinction at all. Plaintiff Rothstein's rent is $103.25 per month for herself alone in Nassau County (Murphy Aff. p. 10)—nearly $20 higher than the average rent for a family of *four* on welfare in the City of New York. Plaintiff Batson similarly receives $108 per month for rent for herself alone in Westchester County (*id.* p. 11). The actual monthly amounts received by these plaintiffs, as a result of these rents substantially in excess of average rents paid to City welfare recipients, are in fact greater than the total received by many comparable City welfare recipients. This alone demonstrates the conjectural nature of the claim of invidious discrimination here, and the impropriety of the injunction. This is bolstered by New York City's higher maintenance and security costs and higher crime rate (Murphy Aff. p. 4).

The only factual evidence offered by the plaintiffs was to the effect that the costs of transportation in Nassau County exceeded that in New York City, but this undeniable fact would be relevant only if the Legislature had not provided a differential for New York City recipients based upon a greater *need* for transportation to recreational and cultural facilities. Since City welfare recipients were determined by the Legislature and by appellant Commissioner to require transportation with far greater frequency, the Legislature clearly had a right to grant an additional stipend for that purpose. And, it is to be noted, the Commissioner, pursuant to the discretion vested in him by § 131-a(4), has already substantially increased the allowances paid to recipients outside New York City, thereby nearly halving the differential. See p. 8, *supra*. Further, plaintiffs are free to apply to appellant Commissioner or to county Social Services authorities for

elimination or further reduction of the differential upon submission of proof supporting such an application. See pp. 8, 10, *infra.*

The claim that, irrespective of the equal-protection issue, § 131-a violates the Social Services Act and HEW Regulations, is untenable. The statute relied upon by plaintiffs (42 U.S.C. § 302[a][1]) requires a State plan to "be in effect in all political subdivisions of the state." Section 131-a obviously complies with this provision. The HEW Regulation relied on by plaintiffs (45 CFR § 233.20[a]) states that programs shall specify a statewide standard and uniformly apply that state standard throughout the state. The plaintiffs and the Court below conceded that this statute and regulation did not necessarily require an identical standard throughout each state (19a), and the lower Court acknowledged that these provisions "would appear to be aimed at the fundamentally sound objective" of protecting recipients "from adoption of different eligibility standards or other criteria for different areas" (18a-19a). The Court below itself deferred determination of this contention "in anticipation of a ruling by H.E.W." (19a) and did not base its injunction on that claim.

This disposition was plainly correct and should have been a basis for denial of the preliminary injunctions. See *Catholic Medical Ctr.* v. *Wyman*, —— F. Supp. —— (E.D.N.Y., 69 Civ. 641, decided Oct. 21, 1969), in which the three-judge Court (FRIENDLY, C.J., MISHLER, D.J. and JUDD, D.J.) deferred determination of the validity of New York's Medicaid provisions, also challenged on both Constitutional and statutory grounds, "until the United States Secretary of [HEW] has an opportunity to express his views." The Court added, citing *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 619 (1944), that "[s]ince H.E.W. is not a party to this litigation, it seems proper to defer decision of the motions for a short period in order to hear from the Department. It may be that H.E.W. has

dealt with similar problems in some other state, that it has relevant negotiations under way, or that it will point to some part of the statutory scheme for its participation that we have overlooked."

The preliminary injunction was of necessity based on the conclusion that the plaintiffs had "made a clear showing of probable success" (19a). In the absence of such a showing, the extraordinary broad and drastic injunction granted them, resulting as it does in the disbursement of enormous sums of federal, state and county funds which will be impossible to retrieve, was clearly improper.

2. The issue sought to be litigated here is unripe for federal judicial determination since the statute explicitly provides a remedy in the courts of the state.

The claim on which the preliminary injunction was based, was, as we have shown, on one of the contentions originally raised in *Rosado* v. *Wyman*. The three-judge court in that case dissolved itself since that issue had become moot with the enactment of amended § 131 a(4), which permits appellant Commissioner to increase the allowances of recipients in any county, if he finds such increases warranted by the cost of the items in the standard of need of such recipients. A county Social Services official may apply for such an increase.

In its decision, the three-judge court specifically noted:

> "Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by the local Social Services officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide

schedules for monthly payments in all parts of the States which reflect differences in cost of living."

This order, affirmed by the Court of Appeals and presently on review here, specifically held that an available state remedy existed through the expeditious, summary route of an Article 78 proceeding—the New York codification of the common-law writ of mandamus. That remedy is presently available to the plaintiffs. For this reason alone the issuance of the preliminary injunction here was improper since the Court below should have considered "whether plaintiffs have an adequate, untried remedy under State law." *Schumann* v. *State of New York,* 270 F. Supp. 730, 732 (S.D.N.Y. 1967); *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943). See also *Fenster* v. *Leary,* 264 F. Supp. 153 (S.D.N.Y. 1966), aff'd 386 U. S. 10.

The Court below acknowledged the existence of this available State remedy but sloughed it off on the ground that it had "no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants" (17a). This was implausible since an Article 78 proceeding in the State Courts would provide immediate relief for any aggrieved welfare recipient. While, as the Court held, exhaustion of state court remedies is not a jurisdictional prerequisite, it is an important element to be considered in determining the propriety of broad preliminary relief such as was improvidently granted here. This is particularly so where, as here, § 131-a (4) requires any amendments by the Commissioner to "accord with federal requirements." Thus administrative disposition by HEW would have the force of law. And no delay by HEW has been alleged.

To have saddled the State with the sweeping preliminary injunction such as was imposed here, and then to extend the injunction to a far larger group of recipients in advance of trial, was an abuse of discretion. The Court below

employed the wrong test in determining the validity of the state welfare program, ignored the demonstration of rational legislative purpose provided by appellants, and impermissibly substituted its opinion on policy matters for that of the state Legislature.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, November 18, 1969.

Respectfully submitted,

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Opinion of Statutory Three-Judge Court.

Before HAYS, Circuit Judge, and MANSFIELD and MOTLEY, District Judges

MANSFIELD, D.J.

Plaintiffs in this class action are aged, blind and disabled welfare recipients residing in Nassau and Westchester Counties, New York. They receive payments under a cooperative federal-New York State assistance program established pursuant to the Social Security Act, 42 U.S.C. §§ 301, *et seq.*, § 1382. The program, which must meet certain federal requirements, is financed jointly by the two governments and administered by the State of New York pursuant to its Social Services Law, §§ 131, *et seq.* and regulations promulgated thereunder by its Department of Social Services. Plaintiffs attack a recent amendment of that law, § 131-a, which has resulted in their receiving lower payments than welfare recipients residing in New York City, as violative of the Equal Protection Clause of the Fourteenth Amendment and of certain provisions of the Social Security Act, as amended, 42 U.S.C. §§ 301, *et seq.*, §§ 1202(a)(1), 1352(a)(1) and 1382(a)(1).[1] By way of relief they seek a declaratory judgment to the effect that the amendment is unlawful, and preliminary and permanent injunctions enjoining any enforcement and implementation of the amendment that would reduce public assistance payments received by them below the level available to residents of New York City. Defendants have cross-moved for summary judgment.

For the reasons stated herein, preliminary injunctive relief is granted and defendants' motion for summary judgment is denied.

At all times here involved New York's Social Services Law, § 131, has imposed upon state, county, city and town social services officials the duty "to provide adequately

for those unable to maintain themselves" and, toward that objective, to assume the responsibility of administering the necessary care, treatment and services to the extent permissible under appropriations made by the State and various local governments forming its subdivisions. Subsection 3 of § 131 provides:

> "3. A principal consideration in determining the adequacy of assistance and care [in each case] shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities, *in accordance with the provisions of section one hundred thirty-one-a of this chapter.*" (Bracketed portion deleted and underlined portion added in March 1969)

Prior to the recent adoption of § 131-a the State Department of Social Services (which has the duty of promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, Social Services Law, § 20), acting pursuant to the foregoing provisions, determined the standards of need and the adequacy of allowances to be made for welfare assistance to various categories (including the aged, blind and disabled) by periodic calculations of the cost of component recurring items required to provide a basic subsistence level, including certain items of food, laundry, household supplies, school expenses, utilities, and personal incidentals. The component items were confined, according to defendants, to the "basics of life" and did not include any allowance for transportation to, or use of, recreational or cultural facilities, such as museums, parks or beaches. Following such studies the Department then established administratively a monthly level or standard of need required by a recipient for these items. Other requirements, including rent, fuel for heat, and various

non-recurring, emergency or special needs, were made the subject of separate or special grants and allowances, which are not in issue here except to the extent that they constitute a background leading to the New York Legislature's effort, in adopting § 131-a in 1969, to simplify the cumbersome and complicated structure of welfare grants within the State by making greater use of the so-called "flat grant" system.[2]

In making the calculations forming the basis of the standard of essential needs, the Department did not engage in a county-by-county analysis of the cost of each of the component items, except with respect to utilities, since the variations in cost between counties was not sufficient to warrant any differentiation. For instance, the relevant schedule of costs published by the Bureau of Labor Statistics, U. S. Department of Labor, which was among the publications used by defendant in making its computations, placed New York City and surrounding counties in the same classification. After defendants thus arrived at proposed levels of need annually, they then rebudgeted the case load for the State, taking into consideration the availability of funds at the local level, and recommended revised standards to the State Legislature.

Prior to the recent enactment of § 131-a the last such cost survey made by the State Department of Social Services was in May, 1968, following which the Department, in August 1968, divided the State into three regions known as "SA-1," "SA-2" and "SA-3," for each of which a separate level was established for recipients in that region. The differences between the levels for the three regions were based on variations in utility costs. The region known as SA-1, as thus established by defendants, included New York City and the counties of Duchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester (hereinafter sometimes referred to as the "surrounding counties").

The level established for recipients in the SA-1 region varied according to the number of persons in each household and the age of the dependent children in the household. The level for a single person household, for instance, was established at $66 per month and was increased in gradations to a high of $464 for a household of 10 persons, the exact amount depending on the age of the various children in the household. The important fact for purpose of the present application is that as of August, 1968 the Department of Social Services had concluded that the cost of the essential recurring items going into the allowance level for welfare recipients did not vary sufficiently between New York City and its surrounding counties to warrant any differentiation between the standards of needs for such recipents. Title 18, N.Y.C.R.R., § 352.4.[3]

On March 31, 1969 the New York Legislature enacted § 131-a (Laws of 1969, ch. 184), which established two schedules of maximum flat monthly grants of public assistance (exclusive of shelter and fuel for heating) allowable to recipients, one applicable to New York City and the other to all other social services districts in New York State, as follows:

	Number of Persons in Household							Each
	1	2	3	4	5	6	7	Additional
New York City	70	116	162	208	254	297	340	43
Outside New York City	60	101	142	183	224	257	290	33

A differential in favor of New York City recipients was thus approved, subject to change or elimination by defendants' promulgation of a schedule of lesser monthly allowance levels for any social services district upon a showing that the total cost of the items required to be provided in the schedule actually was less than the schedule established by regulations of the Department.

On May 2, 1969, the Legislature amended the recently adopted § 131-a (Laws of 1969, ch. 411) to permit the Commissioner to *raise or lower* the levels of the schedules for all districts except New York City upon a showing that such a revision was warranted by the cost of the items included in such schedules, subject to the condition that the levels of schedules for districts outside of New York City could not exceed the maximums prescribed for New York City. Thus, as finally amended, § 131-a established a maximum level for New York City that could not be reduced by defendants and a lower so-called "maximum" level for all other social services districts that could be reduced or increased (notwithstanding its characterization as "maximum") up to the New York City level.

The Legislature's reason for thus differentiating between New York City and its surrounding counties, and for guaranteeing a maximum level to the welfare recipients in the former while subjecting those in the latter to the possibility of an increase or decrease in assistance at defendants' discretion, is a mystery, particularly in view of the Department's past practice of grouping them in one classification on the basis of data that had not changed prior to the adoption of § 131-a. The "Legislative Findings and Purpose" set forth at the outset of the amendment contain a declaration by the Legislature to the effect that it was necessary to establish schedules "based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the State." However, the only relevant cost data available to the Legislature was the 1968 cost study that had led the Department of Social Services administratively to establish the schedule of needs for recipients in New York City and surrounding counties at identical levels.

The lack of any rationality for the Legislature's differentiation is deepened by the fact that since the 1968

study no further study of the costs of component items going into the levels has been made. Defendant George K. Wyman, Commissioner of Social Services, testified that his Department did not undertake or furnish any other cost study for the assistance of the Legislature and that as far as he knew the only information furnished by his Department to the Legislature pertaining to such grant levels was that forming the basis of the schedules that had been administratively promulgated by him in 1968. He frankly stated that he did not know why the Legislature differentiated between New York City and surrounding counties, and that it was not done on his recommendation.

The "Legislative Findings and Purpose," as well as other evidence furnished by plaintiffs, indicates that budgetary considerations may have played a role in the adoption of § 131-a. At the outset of the amendment the Legislature referred to "the spiralling rise of public assistance rolls and the expenditures therefor, despite continuous prosperity and high employment." It went on to emphasize that the new schedules would "release caseworkers for the more important task of providing services." Its newly adopted schedules for the most part did not increase the standards of needs for recipients, and in some instances they substantially reduced existing levels. Drastic reductions have been made in allowances for certain special needs not provided for in the basic monthly grants.

On June 5, 1969, pursuant to the authority granted to him by § 131-a, as amended, defendants promulgated schedules increasing the levels of welfare allowances for districts located in surrounding counties to a point where the gap that had been established by the Legislature between them and New York City was partially closed. For instance the allowance for a single adult household was raised from the $60 established by the Legislature to $65, which brought it within $5 of the $70 level fixed by the

Legislature for New York City. Levels for larger households in the surrounding counties were similarly increased to within $4 to $5 per person below the New York City level.[4]

Notwithstanding defendants' earlier decision, based on the only available cost data, that the levels for New York City and surrounding counties should be identical, they now decided that a differential of from $4 to $5 per person could be justified on the ground that New York City recipients were required to spend more money on what was described as the "social cost of living in the urban center" arising out of a "higher level of aspiration," and "greater expectations, the effects of living in a great metropolitan center and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more space in which to play." Such additional expense, according to defendants, would include "transportation to beaches, museums and parks" and "high laundry and housecleaning expenses due to soot, air pollution and the like." Although defendant Wyman testified that he assumed that certain cultural, medical and recreational facilities (such as museums, parks, community and religious centers, clinics, children day care centers, and beaches) are more available in New York City to recipients there than are similar facilities to recipients in surrounding counties, and are used to a greater extent by recipients in New York City, he conceded that his Department had no evidence or study supporting his assumption.

There is no evidence that the factor of "social cost of living," as thus defined, was considered by the Legislature at the time when it enacted § 131-a, and defendant Wyman testified that as far as he knew the Legislature did not have before it any evidence pertaining to the cost or use of such cultural opportunities. On the other hand, plaintiffs have furnished extensive evidence, including detailed analyses

of transportation costs made by the Nassau County Planning Commission, establishing that the cost of transportation to museums, clinics and other types of recreational facilities in Nassau is substantially higher than that in New York City.[5] Although defendant apparently concedes that the Legislature did not establish the differential between New York City and surrounding counties upon the theory now advanced by him, he points out that the New York City Department of Social Services, in connection with a 1968 demonstration project which provided for a flat annual cyclical grant of $100 per year in lieu of *special* grants to recipients for certain types of clothing and household items, stated that "the nature of the urban crisis and the higher social cost of living in the metropolitan center requires a differential assistance level in these areas." However, such *special* grants were for items not embraced by the alowances here under consideration. Furthermore, although defendant Wyman had the foregoing statement available to him in 1968, he nevertheless established identical levels for New York City and its surrounding counties. Thus there is nothing in the record before us at this time to support the theory that the Legislature established a differential based upon a higher "social cost of living" in New York City.

In support of their application for preliminary relief plaintiffs urge that § 131-a and the regulations established by defendants thereunder violates their rights under the Equal Protection Clause of the Fourteenth Amendment for the reason that it creates an irrational, unjustifiable inequality between welfare allowances granted to residents of New York City and those of surrounding counties, with the result that even though the gap has been partially reduced by defendants' administrative action, it is substantial enough to cause irreparable injury to plaintiffs and persons in the same class, who live at a bare subsistence

level and for whom the sum of $5 per month can be crucial in mitigating their hardship and suffering and enabling them to survive. In the alternative, plaintiffs urge that § 131-a violates the provisions of the Social Security Act, 42 U.S.C. §§ 302(a)(1), 1202(a)(1), 1352(a)(1), 1382(a)(1), requiring that standards of need established under a co-operative federal-state assistance program be state-wide and uniform in character.

The Equal Protection Claim

Turning first to the constitutional issue, which forms the basis of this Court's jurisdiction under 28 U.S.C. § 2281, we advert initially to certain fundamental principles by which we are governed in assessing plaintiffs' contention that their rights to equal protection have been violated. At the outset we recognize that since the Equal Protection Clause applies to persons rather than places, "[t]erritorial uniformity is not a constitional requisite," *Salsburg* v. *Maryland,* 346 U. S. 545, 552 (1953), and that generally "there is no rule that counties, as counties, must be treated alike." *Griffin* v. *School Board,* 377 U. S. 218, 230 (1963). With the needs and desires of its various subdivisions in mind, a state has the constitutional power to legislate in a manner which may create inequalities between those residing within different local governmental units, provided the statutory discriminations rest on grounds relevant to the statute's purposes. *Griffin* v. *School Board, supra; McGowan* v. *Maryland,* 366 U. S. 420, 425 (1960); *Salsburg* v. *Maryland, supra.* However, a legislative discrimination which is purely arbitrary and draws invidious, irrational distinctions cannot withstand a Fourteenth Amendment attack. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150 (1896).

The line between constitutionally permissible and impermissible legislative inequalities is far from crystal clear. "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 669 (1965). Certain broad principles, however, are now well established. When the challenged classifications pertain to the conduct of business transactions, the Supreme Court has freely recognized the difficult problems and interests that state legislatures must balance. In such cases, even though the reason for the statute may be unstated and difficult to discern from surrounding circumstances, the presumption in favor of validity is favored, *Brown* v. *Maryland,* 25 U. S. (12 Wheat) 419, 436 (1827), and we are guided by the principle that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1960) (state Sunday closing laws). Absent an invidious distinction, or one affecting a fundamental or critical personal right, wisdom dictates that in the interest of maintaining a proper balance between state and federal authorities the Equal Protection Clause should not be used to interfere with the state legislative process. The need or appropriateness of legislation is to be determined by the legislature, not the courts, and the latter should not substitute their economic or social beliefs for those of the former. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1962). We do not "sit as a superlegislature." *Salsburg* v. *Maryland,* 346 U. S. 545, 550 (1953). Traditionally such business and economic legislation, even though it might create inequalities, has withstood attack if it could possibly bear some reasonable relationship to the statutory purpose. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911) (regulating drilling for natural gas); *Morey* v. *Doud,* 354 U. S. 457, 463, 464 (1957) (regulating use of premises as

"currency exchanges"), *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1954) (regulating the sale of eye glasses); *Ft. Smith Light Co.* v. *Paving Dist.*, 274 U. S. 387 (1926) (imposing duty to repair on street railways).

Where legislative classifications create inequalities affecting the exercise of fundamental or critical personal rights, however, a more stringent standard is applied in determining whether such distinctions are prohibited by the Equal Protection Clause. Particularly where they operate to the detriment of a disadvantaged minority, they are "closely scrutinized and carefully confined," *Harper* v. *Virginia Bd. of Elections, supra* at 670. Mere speculation as to a possible rational basis or justification for the distinction is insufficient. "Such a law, even though enacted pursuant to a valid state interest bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964) (striking down state law prohibiting interracial marriage). The standard has more recently been described in even stricter terms as one making constitutionality depend upon whether the statute "promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4339 (1969) (holding unconstitutional residency requirements for welfare payments); see also *Hobson* v. *Hansen*, 269 F. Supp. 401, 506-507 (D. C. 1967) (Wright sitting by designation).

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right.[6] But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to

insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless." Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be labeled a "right," "privilege" or "benefit." See *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights. Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the latin *aequitas*), should least of all be denied the poor."

Applying the foregoing principles to § 131-a of the Social Services Law, we must conclude, on the basis of the record now before us, that the differential between allowance levels established for welfare recipients in New York City and those in surrounding counties constitutes

an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, even when judged by the traditional, rather than the more stringent, standard. Turning first to the statute itself, if the Legislature had not gone to the trouble of expressly stating its "Findings and Purpose" more room might exist for speculation as to a possible reasonable basis for the unequal treatment of recipients. But its reasons are expressed, and in some detail. While recognizing certain advantages in a uniform schedule of monthly grants and allowances, the statement fails completely to provide any reason for the uneven treatment of recipients in New York City, on the one hand, and those in surrounding counties, on the other, except to imply that it was the result of budgetary considerations.

There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the basis of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York City as for the seven surrounding counties. In the face of such convincing and uncontroverted evidence we cannot, therefore, assume that the Legislature founded the statutory disparity upon a geographical variation in cost of the component items. Nor would we be warranted in upholding the discrimination as being in furtherance of a legislative desire to reduce welfare costs, an objective recently rejected by the Supreme Court in *Shapiro* v. *Thompson*, *supra*:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures,

> whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be a independent ground for an invidious classification." (*Shapiro* v. *Thompson*, 37 U.S.L.W. 4333, 4337 (April 22, 1969))

Thus a reduction in welfare benefits is perinissible under the Equal Protection Clause only if it is not effected through arbitrary inequalities.

Pursuant to the provisions of § 131-a as enacted by the Legislature, defendant Wyman might have promulgated new schedules for the surrounding counties, which would raise their allowance levels to the level prescribed for New York City. In that event the constitutional issue before us might have become moot, a consideration which prompted the three-judge court in *Rosado* v. *Wyman*, —— F. Supp. —— (1969) to dissolve itself and remand that case to Judge Weinstein. However, although Commissioner Wyman has reduced the gap between the levels for New York City and the surrounding counties by promulgation of new schedules, there remains a difference of approximately $4 to $5 per person between the levels of the two schedules. While this may seem minor to most citizens, it is of crucial importance to the recipients here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g., telephone service for medicines and groceries; food for seeing-eye dogs; transportation allowances to hospitals; special diets for diabetics; readers for the blind; "homemakers" for those confined to wheelchairs; etc.). To an indigent person now receiving ap-

proximately 90¢ per day for food, an additional 15¢ per day can hardly be described as *de minimis*. Access to such bare necessities of life, on a non-discriminatory basis, involves a critical interest for those whose life depends on it.[10] The issue has not, therefore, been mooted and the constitutional question remains a substantial one.

The bases advanced by defendant for upholding § 131-a, or at least deferring preliminary relief, are wholly lacking in persuasion. The first of these is that the needs of New York City welfare recipients are greater than those of recipients elsewhere because of what is termed "the higher social cost of living." At first blush there might appear to be something to the proposition that the plight of the welfare recipient living in grim and dismal quarters in a New York City ghetto is so miserable and frustrating that he is led to make greater use of parks, beaches, museums, recreational and cultural centers than is the recipient in the City's suburban counties, particularly since these facilities are within easier reach in New York City. The need for such facilities, referred to euphemistically by defendants as arising from "a higher level of aspiration" and "greater expectations," would require funds not only for transportation but also for payment for use of those not furnished free of charge (*e.g.*, admission fees to a semi-public beach).

In the absence of an iota of evidence to support an assumption that welfare recipients encounter such a "higher social cost of living," we find ourselves unable to accept it. We question whether the aged, blind and disabled are able, in view of their physical handicaps, to make any appreciable use of many of the facilities described by the defendant, such as beaches and museums. Furthermore, is it reasonable to assume that welfare recipients living at or below a subsistence level, who are provided for their nutritional needs with less than $1 per day (the buying power of which is diminishing weekly as the cost of living rises sharply), will sacrifice any sub-

stantial part of their meager payments in favor of cultural, recreational and educational benefits? We doubt it. Even if it could be shown that a part of such payments is used for these purposes, defendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients. Under such circumstances we cannot accept the proposition that recipients living in similar conditions in New York City need or use recreational or cultural facilities more than do recipients in suburban areas.

In any event, extensive and reliable proof has been offered by plaintiffs to the effect that the cost of transportation to recreational facilities, museums, beaches and hospitals in the surrounding counties, such as Nassau, is substantially greater than that incurred by New York City residents who are located closer to such facilities and have cheaper transportation available to them. For instance, while New York City residents can normally travel quickly to parks, beaches, museums and hospotals for the cost of a subway ride (ten cents each way for the elderly, twenty cents for all others), residents outside of New York City are faced with public transportation provided by a number of private companies at much higher costs (up to $1.70 per trip), requiring numerous transfers and considerably more time and expense. Consequently, defendants' argument that the disparity in levels is justified by New York City residents' increased need for and cost of transportation to such facilities must be rejected on the record before us.

We also find no merit in defendants' further argument that in view of the pendency of a petition by Nassau County for an increase in the allowance levels promulgated for it and the availability to surrounding counties of various other state remedies as a means of seeking an increase in the level of payments available to them, the constitutional issue is not ripe for determination. The situation has changed substantially since the three-judge court in *Rosado* v. *Wyman* dissolved itself on the ground that the issue raising its jurisdiction (essentially the issue now before this Court) might be rendered moot by administrative action. Administrative action now has been taken and it has failed to moot the issue. Any further delay could work substantial and irreparable injury to plaintiffs. We have no assurance that the issues would be promptly resolved by any of the state court procedures suggested by defendants. No reasons exist, therefore, for abstention;[12] and exhaustion of state court remedies is not a prerequisite. *King* v. *Smith*, 392 U. S. 309, 312, fn. 4 (1968); *Damico* v. *California*, 389 U. S. 416 (1969); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956); *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968).

The Claim of Violation of the Social Security Act

In view of our disposition of the constitutional issue, upon which our jurisdiction is grounded, it is unnecessary to dwell at length on plaintiffs' alternate contention that § 131-a violates applicable provisions of the Social Security Act, an issue over which this Court has pendent jurisdiction. *Smith* v. *King*, 277 F. Supp. 31 (1967). Plaintiffs' argument is founded on the proposition that 42 U.S.C. § 302(a)(1) and § 1382(a)(1), and regulations promulgated thereunder by the Department of Health, Education

and Welfare ("H.E.W."), require states participating in federally-financed assistance programs to conduct them on a state-wide basis pursuant to uniform standards. Applying that principle here, plaintiffs contend that, while the application of such uniform standards may lead to different levels of assistance in different areas of a state, § 131-a is fatally defective for the reason that it simply creates disparities arbitrarily and without adoption or application of uniform standards. See *King* v. *Smith*, 392 U. S. 309, 326-327 (1968).

Section 302 deals with state plans for old-age assistance and medical assistance for the aged while § 1382 is concerned with State plans for aid to the aged, blind and disabled, and medical assistance for the aged. Both statutes require in subsection (a)(1) that any such plan

> ". . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them be mandatory upon them."

Further support for a requirement of state-wide uniform standards is found in regulations recently promulgated by the H.E.W., 34 *Federal Register* No. 19, pp. 1394-1395 (Jan. 29, 1969), and codified as 45 C.F.R. § 233.20, which direct that state plans "[p]rovide that the standard [of assistance] will be uniformly applied throughout the State," 45 C.F.R. § 233.20(2)(iii), and

> "[p]rovide that payment will be based on the determination of that amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjudgments will be made by methods applied uniformly statewide. 45 C.F.R. § 233.20(3)(viii)."

On their face the foregoing provisions of the Social Security Act and regulations would appear to be aimed at

the fundamentally sound objective of assuring that persons in like circumstances should be treated equally throughout a state rather than exposed to the type of unfair hodgepodge that could result from adoption of different eligibility standards or other criteria for different areas. Indeed, a quotation cited by plaintiffs from a letter of James Callison, H.E.W. Regional Commissioner for Region II (which includes New York State) to defendants, dated April 16, 1969, indicates this was the H.E.W.'s objective in inquiring whether the differential between levels promulgated under § 131-a for New York City and other areas of the State "may be justified on the basis of differences in the cost of living in local areas." Plaintiffs' non-constitutional argument, however, is based primarily on regulations promulgated by H.E.W. Since the schedules and regulations adopted by defendants are now under review by that agency, which possesses considerable expertise with respect to its own regulations and should be entitled to interpret them in the light of the complexity of problems presented by various welfare programs, see 45 C.F.R. § 233.20(1), we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W.

Preliminary Relief

Having thus made a clear showing of probable success, plaintiffs have also demonstrated that denial of preliminary relief will work a much more severe hardship upon them, amounting to irreparable injury, than any hardship that would result to defendants from the granting of preliminary relief. *Clairol Incorporated* v. *Gillette Company*, 389 F. 2d 264 (2d Cir. 1968); *Unicon Management Corp.* v. *Koppers Company*, 366 F. 2d 199, 204 (2d Cir. 1966); *Dino de Laurentiis Cinematographica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 375 (2d Cir. 1966). To plaintiffs the difference

between the monthly payments to them and to recipients in New York City represents the bare essentials of life, whereas if defendants should ultimately prevail any such differentials paid in the interim to plaintiffs and others similarly situated would be recoverable or offset against future allowances. Since no issue has been raised, upon this application for preliminary relief, as to the classification of the lawsuit as a class action under Rule 23, F.R.C.P., the action will be treated as such for purposes of temporary relief.

Accordingly, plaintiffs' motion for preliminary relief is granted to the extent that pending trial and final determination of the action defendants will be restrained from further enforcement or implementation of § 131-a of the New York Social Services Law, or from promulgating schedules of grants and allowances of public assistance, or making payments thereof to recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients. Trial of the action will commence on October 6, 1969 at 10:00 A.M. Defendants' motion for summary judgment is denied.

The foregoing constitutes the Court's findings of facts and conclusions of law pursuant to Rule 52(a), F.R.C.P.

Submit order on notice in accordance with Rule 65(d), F.R.C.P.

Dated: August 4, 1969.

PAUL R. HAYS
Paul R. Hays,
U. S. Circuit Judge

WALTER R. MANSFIELD
Walter R. Mansfield,
U. S. District Judge

CONSTANCE BAKER MOTLEY
Constance Baker Motley,
U. S. District Judge

FOOTNOTES

[1] "A state plan . . . must . . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 302(a)(i) (Old Age Assistance). Identical requirements are found in § 1202(a)(i) (Aid to the Blind); § 1352(a)(i) (Aid to the Permanently and Totally Disabled); and § 1382(a)(i) (the combined program of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged). Since New York administers a composite program under § 1382, that statute will be referred to herein as the basis for plaintiffs' claim.

[2] In 1968 the City of New York with H.E.W. approval, established a demonstration project authorizing the elimination of *special* grants for certain clothing and household replacements and the payment, in lieu thereof, of the sum of $100 per year to each repicient. This experiment in the flat grant approach to public assistance was believed by some to offer certain advantages, including less affront to a recipient's dignity than the special grant method, more opportunity for the recipient to budget, reduction of administrative costs, and freeing caseworkers for counseling duties.

[3] "352.4 *Needs—items of basic maintenance.*

* * * * *

"(2) The pre-added monthly allowance schedule for food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry for AABD, expenses incident to AABD, including sales taxes related thereto, shall be as follows:" (Codes Rules and Regs. of State of N. Y. Title 18, § 352.4)

There follows a schedule of identical monthly sums for New York City and the Counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

[4] Plaintiffs have introduced extensive evidence supporting the conclusion that New York City and surrounding counties should be treated iidentically. The United States Department of Labor's Bureau of Labor Statistics prepares and presents costs of living material for the New York metropolitan area without drawing any distinction in living costs between New York City and the surrounding counties, whereas distinctions are drawn between such metropolitan area and the rest of the state. See, e.g., *Three Standards of Living for an Urban Family of Four Persons*, U. S. Dept. of Labor, 1969, p. 16; *Standard Metropolitan Statistical Areas*, U. S. Bureau of the Budget, 1967.

Footnotes.

A comparison of cost figures published by New York City, Westchester and Nassau for major items forming components of the grant levels under consideration reveals that the cost of most basic items of food and clothing are identical, whereas most household furnishings cost more in Westchester and Nassau than in New York City, possibly because of greater competition and more second hand stores in New York City. See *Handbook for Case Units*, New York City Dept. of Social Services, Jan. 1968; *Price Guide Bulletin* #9, Westchester County Dept. of Social Service (1967); *Price Guide—Clothing & Household Furnishings*, Nassau County Dept. of Social Services, Oct. 1, 1968.

[5] See affidavit of John Calbreath Burdis, Planning Director, Nassau County Planning Commission, and exhibits thereto.

[6] Welfare assistance does represent a statutory right, as distinguished from charity. If a person meets the requirements prescribed by statute under a federally assisted program, the agency is obligated to recognize his claim. See Reich, The New Property, 73 Yale L. J. 733, 785-786 (1964); Note, Development in Law, Equal Protection, 82 Harv. L. R. 1065, 1192 (1969).

[7] The concept was expressed by President Roosevelt in his June 8, 1934 message to Congress recommending legislation on economic security:

> "Among our objectives I place the security of the men, women, and children of the Nation first.
>
> "This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours."

The substance of the message has been repeated by every President since that date.

[8] Our constitutional guarantees dictate the abandonment of a philosophy, which has long prevailed in many quarters, that the poor and disabled must be treated as "nonperson allowed to receive charity but not entitled to equal rights."

[9] The surrounding counties would still be discriminated against to the extent that § 131-a, as amended, guarantees New York City recipients the maximum level, whereas those in surrounding counties are forced to establish that the total costs of items included in the schedules applicable to their districts is more than the cost thereof

reflected in such schedules. Since the evidence before us, however, indicates that the costs are identical, the Commissioner would be required to raise the levels of the surrounding counties to that of New York City.

[10] The standards promulgated under the Social Services Law are described by Joseph S. Barbaro, Commissioner of Social Services for Nassau County, who has carefully studied the needs of welfare recipients, as follows:

> "The present standards of assistance provide for life on a level of sustenance, nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less." (Aff. of Joseph S. Barbaro, sworn to June 19, 1969)

[11] For example, the United States Department of Labor announced that for the first six months of 1969 the cost of living in the New York City area was increasing at the rate of 6.4% per year, which continued the trend experienced in 1968. New York Times, July 24, 1969, page 1, col. 1.

[12] Unlike the situations in *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167 (1959), and *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd.*, 386 U. S. 10 (1967), the facts here reveal a classic instance of the type of special circumstance calling for exercise of federal jurisdiction. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Dombrowsky* v. *Pfister*, 380 U. S. 479 (1965); and *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

Decision and Order Convening the Three-Judge Court.

Decision and Order Concerning the Three Judge Court

amendment in connection with the aid program for dependent children. *Rosado v. Wyman*, 322 U.S. 255. The constitutional claims were held not insubstantial by the single District Judge. *Rosado v. Wyman*, F. Supp. (E.D.N.Y., April 24, 1969), and by the three judge court when convened. *Rosado v. Wyman*, F. Supp. (E.D.N.Y., May 12, 1969).

However, the New York Legislature amended the new provisions on May 9, 1969, to allow the Social Services Commissioner and local social services officials to continue benefits in counties outside of New York City up to the New York state level. The three judge court then held the complaint stands moot and not ripe for adjudication by that court until there has been an opportunity for a hearing in state officials and until the matter comes before that court in an appropriate procedure. *Rosado v. Wyman*, supra, at (May 12, 1969).

Plaintiffs now claim that the defendant's continuance has denied the opportunity given him by that three-judge court so that he promulgated a new schedule of grants to plaintiffs' counties. However, it is alleged that this new schedule provides benefits still well below the New York state level without rational justification and that the constitutional questions are now ripe for adjudication.

The court agrees and accordingly, the motion to convene a three judge court is granted and the clerk is directed herewith to the Chief Judge of the Circuit.

Dated: New York, New York, July 7, 1969

[illegible]

[illegible]

[illegible]

U.S.D.J.

Preliminary Injunction Order.

Plaintiffs having moved this Court for a preliminary injunction staying the enforcement of § 131-a of the New York Social Service Law and regulations promulgated thereunder in a manner which discriminates against recipients of Aid to the Aged, Blind, and Disabled in certain counties outside the City of New York, and defendants having moved this Court for summary judgment, and these motions having been considered by this Court:

Upon the pleadings, affidavits, briefs and oral depositions submitted on behalf of the parties, the hearings held to date, and the opinion of this Court dated August 4, 1969, this Court having found in said opinion that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled residing in New York City and those to residents of the counties of Duchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, it is

ORDERED, ADJUDGED AND DECREED THAT

1. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Service Law with respect to recipients of Aid to the Aged, Blind and Disabled, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients, other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients;

2. Defendants' motion for summary judgment is denied.

Dated: New York, N. Y., September 12, 1969.

PAUL R. HAYS
Paul R. Hays, U.S.C.J.

WALTER R. MANSFIELD
Walter R. Mansfield, U.S.D.J.

CONSTANCE BAKER MOTLEY
Constance Baker Motley, U.S.D.J.

Order Granting Leave to Intervene and Extending Preliminary Injunction.

Plaintiff-applicants Catherine Jones and Dolores Harvanek, having moved this Court for leave to intervene into the instant action as party plaintiffs on behalf of themselves and on behalf of all other recipients of public assistance in the Aid to Dependent Children category, who are similarly situated, and said plaintiff-applicants having also moved for a Preliminary Injunction staying the enforcement of § 131-a of the New York Social Services Law and regulations promulgated thereunder in a manner which discriminates against recipients in the Aid to Dependent Children category in certain counties outside the City of New York, and these motions having been considered with due deliberation by this Court;

Upon the pleadings, affidavits, brief and oral depositions submitted initially on behalf of the original parties, the hearings held to date between the original parties, and the pleadings, affidavits and briefs submitted on behalf of the plaintiff-applicants herein, and the affidavit submitted in opposition by the defendants, this Court having found in an opinion dated August 4, 1969 that the differential established by § 131-a and regulations promulgated thereunder between public assistance grants to recipients of Aid to the Aged, Blind or Disabled categories residing in New York City and those to residents of the counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester constitutes an arbitrary, invidious inequality in violation of the Equal Protection Clause; it appearing to the Court that the said Catherine Jones and Dolores Harvanek should be permitted to intervene as representatives of recipients of Aid to Dependent Children, it is

Order Granting Leave to Intervene and Extending Preliminary Injunction

ORDERED, ADJUDGED AND DECREED that

1. The plaintiff-applicants Catherine Jones and Dolores Harvanek have leave to intervene herein on behalf of themselves and on behalf of all recipients in the Aid to Dependent Children category who are similarly situated, may file instanter their complaint in this cause in the same manner and with like effect as if named as an original party, and are hereby made a party to this cause;

2. The caption of the instant action shall be amended to include the names of the plaintiff-applicants to read:

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, individually and on behalf of all other persons similarly situated,

Plaintiffs,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES for the State of New York,

Defendants.

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3. Pending further order of this Court or termination of this action, defendants, their agents and employees are restrained from the enforcement or implementation of § 131-a of the New York Social Services Law with respect to recipients of Aid to Dependent Children, or from promulgating schedules of grants and allowances of public assistance or making payments thereof to such recipients.

other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients.

Dated: New York, New York, October 20, 1969.

PAUL R. HAYS
Paul R. Hays,
U.S.C.J.

WALTER R. MANSFIELD
Walter R. Mansfield,
U.S.D.J.

CONSTANCE BAKER MOTLEY
Constance Baker Motley,
U.S.D.J.